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IN THE
COURT OF APPEALS OF INDIANA

PEDRO A. CORDOBA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0606-CR-495
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0508-FC-146421

May 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a bench trial, Appellant, Pedro A. Cordoba, was convicted of one count of Child Molesting, as a Class C felony.[1] Upon appeal, Cordoba claims that the trial court erred in sentencing him.

We affirm.

The record reveals that in August of 2005, Cordoba lived in a home in Marion County with his girlfriend Maria and her three children, including then nine-year-old P.J. On at least two occasions, while P.J. waited in her mother's bedroom for the school bus, Cordoba entered the room and touched P.J. over her clothes on her chest, buttocks, and genital area. This occurred while P.J.'s mother was at work, her sister was at school, and her brother was with a babysitter. Both Cordoba and P.J. were clothed when he touched her. After touching her, Cordoba threatened P.J. by saying he would kill both her and her mother if she told anyone what had happened. P.J. was very frightened of Cordoba, but told her mother, her sister, and a school social worker about being touched by Cordoba. The incident was reported to the police, who investigated the situation and eventually spoke with Cordoba. In Cordoba's voluntary statement to the police, he admitted to having touched P.J.'s chest and genital area but claimed to have done so only while tickling her.

On August 29, 2005, the State charged Cordoba with three counts of child molesting, all as Class C felonies. On May 1, 2006, Cordoba waived his right to a jury trial, and the case was tried before the trial court on May 3, 2006. At the conclusion of

[1] Ind. Code § 35-42-4-3(b) (Burns Code Ed. Repl. 2004).

trial, the court found Cordoba guilty of one count of child molesting but, not certain as to how many times the molesting had happened, acquitted him upon the other two counts.

On May 19, 2006, the trial court held a sentencing hearing. At the conclusion of the hearing, the trial court found the following aggravating factors: that Cordoba had a prior criminal history, specifically, a 2002 conviction for invasion of privacy, a 2003 conviction for criminal recklessness, a 2003 conviction for operating while intoxicated, and a 2005 conviction for public intoxication; and that Cordoba was in a position of trust with the victim. The court also found as mitigating that Cordoba had a history of substance abuse. The court then sentenced Cordoba to seven years, with five years executed and two years suspended to probation. Cordoba filed a notice of appeal on June 14, 2006.

Upon appeal, Cordoba claims that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. Pursuant to Indiana Appellate Rule 7(B), this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." In attacking the appropriateness of trial court's sentence, Cordoba claims that the trial court gave too much weight to the aggravating factors and overlooked certain mitigating factors. See Long v. State, No. 67A01-0607-CR-273 (Ind. Ct. App. May 7, 2007) (citing McMahon v. State, 856 N.E.2d 743 (Ind. Ct. App. 2006), for the proposition that when assessing the appropriateness of a sentence under the advisory

sentence scheme, we should review the aggravating and mitigating circumstances identified or not identified by the trial court).[2]

Cordoba claims that his criminal history is not that significant, emphasizing that his prior convictions were all misdemeanors. Cordoba's 2002 conviction for invasion of privacy was indeed a Class A misdemeanor. However, the pre-sentence investigation report indicates that Cordoba was given probation, but violated the terms thereof and had his probation revoked. Cordoba was also alleged to have violated the terms of the probation he was placed upon after being convicted for OWI in 2003. Furthermore, Cordoba has been in the United States for a short time—approximately six years—yet has been arrested six times and convicted four times prior to the instant offense. Although Cordoba's criminal history might not be the worst imaginable, we agree with the State that this does not reflect positively upon Cordoba's character. Despite having prior contacts with the criminal justice system, and even being placed upon probation, his criminal behavior has not been deterred.

We note that the trial court also considered as an additional aggravating circumstance that Cordoba violated a "position of trust." As explained by the trial court,

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[2] We recognize that a split has emerged in this court as to the manner in which appellate review should be conducted under the post-Blakely advisory sentencing scheme and whether trial courts are required to issue sentencing statements justifying the imposition of any sentence other than the advisory sentence. Compare McMahon, 856 N.E.2d at 749 (holding that trial courts are required to issue sentencing statements to support deviation from advisory sentence) with Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) (holding that trial courts are not required to find, consider, or weigh aggravating or mitigating circumstances under advisory sentence scheme), trans. denied. There appears to be agreement, however, that sentencing statements provide meaningful assistance to this court in our review under Appellate Rule 7(B). See Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006).

Here, although Cordoba criticizes the trial court's aggravators and the failure to find certain mitigators, he does so in a challenge to his sentence as being "inappropriate." We therefore address his argument in terms of the appropriateness of his sentence.

"[P.J.'s mother] was kind enough to let [Cordoba] stay in her home and sleep on her couch and [Cordoba] w[as] in there molesting her child[] when she went to work, which is horrible. [Cordoba] w[as] in a position of trust with this family, and [he] violated that trust." Tr. at 111. Cordoba does not challenge the validity of this aggravator upon appeal.

Cordoba also claims that the trial court failed to consider certain mitigating factors. Specifically, Cordoba claims that the trial court should have considered as mitigating that incarceration would impose an undue hardship upon Cordoba's family, and that Cordoba's responses on the "sex offender outline," which was incorporated into the pre-sentence investigation report, made it unlikely that he would again commit a similar crime.

We first note that Cordoba did not argue to the trial court that these circumstances were mitigating. When a defendant does not advance a factor to be mitigating at sentencing, the court upon appeal may presume that the factor is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time upon appeal. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000).

Moreover, even if Cordoba had argued these alleged mitigating factors before the trial court, the court would not have erred by failing to consider them as significant mitigators. With regard to Cordoba's claim that incarceration will impose an "undue hardship" upon his family, we observe that the trial court was not required to find that Cordoba's incarceration would result in undue hardship upon his one dependent child and

her mother.[3] See Weaver v. State, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), trans. denied. Indeed, this mitigator can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. Id. Cordoba does not explain and points to no evidence that the enhanced sentence would impose any more of a hardship on his dependents than a shorter sentence. See id. (citing Abel v. State, 773 N.E.2d 276, 280 (Ind. 2002)).

Further, the "sex offender outline," which Cordoba claims indicates that he is unlikely to commit another sex crime against a child, consists of answers he gave to written questions regarding his sexual interest in children. Consistent with his denial of guilt in the present case, Cordoba indicated that he has no sexual interest in children. However, given that the trial court found beyond a reasonable doubt that Cordoba fondled a nine-year-old child with the intent to arouse or to satisfy the sexual desires of either himself or the child, see I.C. § 35-42-4-3(b), the trial court could have considered Cordoba's responses in the "sex offender outline" to be untrustworthy and self-serving. In other words, the trial court was under no obligation to give credit to Cordoba's responses and consider them as mitigating circumstances.

Considering the aggravating and mitigating circumstances, and after due consideration of the trial court's decision, we are unable to conclude that an enhanced sentence of seven years is inappropriate in light of the nature of the crime Cordoba committed and Cordoba's character. Cordoba fondled the breasts and genital areas of a

[3] The record indicates that Cordoba has a daughter, age eight, who lives with her mother in Mexico. Cordoba has been separated from his wife for approximately nine years. Cordoba said that he periodically sent money to Mexico for the mother and child.

nine-year-old girl and threatened to kill her if she told anyone. He had repeated contacts with the criminal justice system but still continued to violate the law, ultimately committing the current Class C felony. Cordoba's seven-year sentence is not inappropriate.

Cordoba briefly claims that the trial court failed to properly explain its balancing of the aggravating and mitigating factors. Presuming, without deciding, that under the advisory sentence scheme a trial court is required to explain its balancing of the aggravating and mitigating factors, we find no error here. The trial court adequately explained why it found each particular circumstance to be aggravating or mitigating. While the trial court's explanation of its balancing of these circumstances might not be terribly clear, it is implicit in the statement that the trial court found the aggravators to outweigh the mitigators. The sentencing statement as a whole articulates the trial court's balancing of the aggravating and mitigating circumstances in a manner sufficient to allow us to review Cordoba's claim that his sentence was inappropriate.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.